No. 2405

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

F. DREW CAMINETTI,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

REPLY TO BRIEF OF SPECIAL ASSISTANT TO THE ATTORNEY GENERAL.

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In view of some of the arguments advanced by the Special Assistant to the Attorney General, we are compelled to make a brief reply.

Furthermore, when this case was called for argument, Mr. Roche stated that he did not have his brief prepared, and asked time to file it later. This was granted, and the plaintiff in error, called throughout the defendant, was allowed to reply, if he desired the privilege. The oral argument was limited in its scope, but the brief filed by Mr. Roche covers a wide field. We, therefore, submit the following reply:

I.

A considerable portion of the brief for the government is devoted to facts antedating the Reno trip, enlarged on for the purpose of showing moral depravity on the part of the defendant. But, taking the testimony quoted in the brief, as well as that not referred to in the brief, but contained in the transcript, it shows:

1. That the defendant Caminetti did not buy any transportation for either Lola Norris or Marsha Warrington.

2. That the defendant Caminetti did not furnish any moneys with which any transportation was bought for either Lola Norris or Marsha Warrington.

3. That there is no competent, legal, or any, evidence that the defendant Caminetti had agreed or had any understanding with Diggs to reimburse him for the furnishing of any transportation for Lola Norris or Marsha Warrington.

4. That the defendant Caminetti did absolutely nothing to transport, or cause to be transported, or aid and assist in obtaining transportation for, Lola Norris or Marsha Warrington.

5. That he did absolutely nothing in violation of the "White slave traffic Act", nor did he have the intent and purpose denounced by the "White slave traffic Act" and alleged against him in the indictment, to wit: "that the aforesaid Lola Norris

should be and become the concubine and mistress of the said defendant".

6. That the intent of concubinage was not formed and did not exist, according to the testimony of Marsha Warrington and Lola Norris, until after the boundary line separating California and Nevada had been passed.

7. That no sexual relations, according to the testimony of Lola Norris herself, existed between herself and the defendant Caminetti, until after reaching Reno.

8. That both parties were guilty of culpable conduct.

9. That such conduct could have been prosecuted under the state laws, and, in fact, both parties were arrested for violations of the state laws and such charges were pending against them both when Lola Norris and Marsha Warrington, who was also under arrest upon similar charges, testified against the defendant.

10. That to constitute the trip to Reno a crime, it was necessary that it should have been taken for the *purpose* stated in the indictment, or at least for a *purpose* denounced by the "White slave traffic Act". The *purpose* is the gist of the offense. The evidence quoted by Mr. Roche shows that such was not the purpose of the trip.

11. It was proven by the defendant that he had been *told* that he and the girls were about to be arrested, and he believed it to be true. The wit-

nesses, who told him this, were produced and so testified. The prosecution attempted to prove that no warrant had been issued for his arrest. This was true, but did not affect the fact that *he had been told* that such a warrant was to be issued.

12. The plaintiff had also been *told* by one of the girls that a reporter on a local paper was about to publish an account of their escapades. Lola Norris said she had been so informed by Marsha Warrington. The prosecution attempted to contradict this, not by showing that he was not so *told,* but that such a tale was not, in fact, to be published. This was not a contradiction of the fact that the defendant had been *so informed.*

13. The father of Maury Diggs was about to have him arrested. This is uncontradicted.

14. The father of Maury I. Diggs had threatened to complain about his conduct to the Board of Control, where defendant Caminetti was employed, and to have him discharged as a public employee on the ground that he was unfit to hold such position. This also is uncontradicted.

15. All the testimony quoted by Mr. Roche shows conclusively that the *purpose* of the trip to Reno was to escape notoriety and arrest.

Such testimony, measured by its legal effect, while it may show moral delinquency, does not show the commission of the crime charged in the indictment. But, a jury, who cannot differentiate between what constitutes a state offense and a fed-

eral offense, is apt to think that a defendant should be convicted on general principles, and this, we contend, was what was done in the Court below. The defendant was not placed on trial for moral delinquency, but for a specific offense. Nor was he on trial for a conspiracy to violate the "White slave traffic Act". We have no quarrel with the authorities, cited by counsel for the government on pages 131-137 of their brief, with reference to the rule that declarations and admissions of an accomplice to crime, made while the conspiracy exists, are admissible in evidence against an accomplice. But, we do maintain that the evidence must not only show that the defendant Caminetti was guilty of a conspiracy (which, however, was not the charge upon which he was being tried), but that he did some *specific act* with the *specific purpose* denounced by the "White slave traffic Act" and alleged against him in the indictment. We submit that it is not simply sufficient for the prosecution, under the allegations of the first count of the indictment, upon which alone the defendant Caminetti was convicted, to show that he was guilty of a conspiracy, without also showing that he committed the *specific act* with the *specific intent* with which he was charged in the first count of the indictment. In their reply brief, counsel for the government, while indulging in a mass of glittering generalities, do not, and indeed are not able, to point to a single thing that the defendant Caminetti did in furnishing the transportation from Sac-

ramento to Reno for Lola Norris, with the unlawful purpose charged against him. He did not buy the railroad or Pullman tickets. He did not furnish the moneys or means with which to buy the tickets. He was acquitted of having persuaded, enticed or induced Lola Norris to leave Sacramento for Reno for any immoral purpose. There is no competent, legal, or any evidence that he ever agreed to reimburse Diggs, who purchased the tickets and furnished the transportation both for Lola Norris and Marsha Warrington, and who now stands convicted for such purchase of said tickets, his case now also pending before this Honorable Appellate Tribunal on a writ of error. In other words, it must be manifest that the defendant Caminetti was convicted of the doing of a specific act with a specific intent upon general principles and because of the many erroneous and prejudicial rulings of the trial Court and of the acts of misconduct of the prosecuting attorneys.

A great deal of the testimony admitted against the defendant was upon the theory, repeatedly announced by the trial Judge, that the prosecution of the defendant was one akin to a conspiracy, and many things that Maury I. Diggs said and did, and many things that Marsha Warrington said and did, were permitted to be introduced in the prosecution against the defendant upon the theory that he was a conspirator. The evidence shows that many of the things said and done by Diggs and Marsha Warrington were unknown to the defend-

ant Caminetti and that he had nothing to do with them and could not have known of them and did not suggest or assist therein. For instance, the fact that Diggs and Marsha Warrington had sexual relations and that Marsha Warrington was pregnant by Diggs, and many things that Diggs said and did without the presence of the defendant Caminetti, were permitted to be introduced in evidence against the defendant, when it affirmatively appears from the evidence in the record that he had nothing to do with the sexual relations existing between Diggs and Marsha Warrington and that he was not even aware that such an act had taken place when it first occurred, for Marsha Warrington herself testified that she never told the defendant Caminetti of what had happened sexually between herself and Diggs (Transcript of Record, p. 280).

Counsel for the government, in their brief, on page 186, make the bold assertion that: "In the case at bar there is an absolute plethora of evidence establishing beyond question the guilt of the accused." We deny this asseveration and state, confidently, that the Transcript of Record discloses that there is a "manifest paucity of evidence tending to establish the guilt of the defendant" of the *specific charge* of the *doing of the specific act* with the *specific intent,* of which he was accused and convicted on the first count of the indictment.

True, there is a mass of evidence of occurrences and statements and things that were done for a considerable time previous to the trip to Reno, but

there is not a scintilla of evidence that the defendant Caminetti transported, or caused the transportation, or aided or assisted in obtaining transportation for Lola Norris, for the immoral purpose set out in the indictment.

True, the prosecution, owing to the liberality of the trial Judge who likened the prosecution to one akin to a conspiracy, was permitted to show automobile trips, carried on by Diggs and participated in by Caminetti, from Sacramento to San Francisco, to San Jose, to Stockton, to Jackson, and other places; but this did not supply or supplant evidence that the defendant Caminetti had furnished railroad transportation for Lola Norris from Sacramento to Reno for any immoral purpose. In other words, a great deal of evidence was admitted about *everything* excepting the one single issue, to wit: What did the defendant Caminetti *do to furnish transportation* for Lola Norris from Sacramento to Reno?

There is absolutely no evidence that he did anything to furnish transportation, or cause the transportation, or aid or assist in the transportation, of Lola Norris with the intent and purpose, existing at the time of the commission of any act by him, alleged in the indictment. If he did do anything, it is extremely strange that the learned and astute special prosecutors have not been able, in a brief covering 265 pages, to point to a single act done by the defendant Caminetti to support the charge and conviction upon the first count of the indictment

that he transported, or caused the transportation, or aided or assisted in the transportation of Lola Norris with the intent and purpose alleged against him.

The strongest that the prosecution now claims against the defendant Caminetti is that he had some understanding or agreement with Diggs to reimburse the latter for his furnishing of transportation for Lola Norris. But, as pointed out in our opening brief, there is no competent, or legal, or any evidence that the defendant Caminetti ever agreed or intended to reimburse Diggs for any furnishing of railroad transportation made by Diggs for Lola Norris.

It is to be observed in this connection, that Diggs was convicted of furnishing the very same transportation for Lola Norris, and that his case is now pending before this appellate tribunal upon his conviction on that charge.

II.

Addressing ourselves, next, to the proposition maintained, on the part of the government, that "the accused having voluntarily taken the witness stand waived *all* immunity" (see subdv. IV, pp. 73-90), it will be noted that counsel for the government constantly confuses and confounds the failure or refusal of a defendant to *answer proper* and *material questions actually put to him on cross-examination* with a radically different situation existing in the case at bar where it appears that the defendant *never refused to answer any proper or material questions* and, in fact, was *not cross-examined at all.*

We respectfully submit, as too plain for argument, that it is one thing, in the law, for a defendant to fail or refuse to *answer proper and material questions,* and that such failure or refusal to answer proper and material questions may be commented upon by the prosecuting attorney in his argument to the jury; and that it is quite another and different thing to permit the prosecuting officer to comment upon the fact that the defendant did not explain or deny certain matters when the prosecuting attorney did not see fit to ask him to explain or deny the matters referred to by him in his argument to the jury; in fact, did not see fit *to cross-examine the defendant at all.*

We concede that, if the defendant in the case at bar had been cross-examined by the prosecuting attorney and had either failed or flatly refused to

answer proper and material questions actually put to him, his conduct in that connection and his failure or refusal could be commented upon by the prosecuting attorney.

But that is not the case at bar. The defendant Caminetti never refused or failed to answer any proper or material questions. He was not cross-examined.

Such being the facts, how can the several authorities and passages from text books relating to the failure or refusal of a defendant "to answer proper and material questions" be deemed applicable?

We contend that the instruction of Judge Van Fleet, on the question of defendant's failing to testify to certain facts, could be used against him, as a matter of law, was erroneous. We contend that it placed an undue burden on the defendant. We maintain that it was misleading. This instruction, or one of similar import, is condemned in

Balliet v. United States, 129 Fed. 689, 696.

In no case has such an instruction been upheld.

Conceding that *counsel in his argument* may comment upon the matter without error, this is quite a different thing from the Court *instructing the jury,* as a matter of law. Many Courts hold that even counsel cannot comment upon it at all. No Court holds that the Judge can give an instruction, such as was given in this case.

Speaking of the Balliet case, Mr. Roche, in his reply brief in the Diggs case in this appellate Court, says (page 88):

> "If it asserts the doctrine claimed by counsel and is the leading case on the subject, it is somewhat remarkable that it has never been, at any time, cited by any federal court as sustaining the doctrine here contended for by plaintiffs in error."

In reply, we may say that this case has never been repudiated by any Court, and that probably the Diggs and Caminetti cases and the Balliet case are the *only cases* in which such an instruction has been given. Mr. Roche, in his elaborate brief, presents, and, we assume, in view of his great industry and research, has been able to find no case in which such an instruction has been upheld. The best that he can do is to present cases in which counsel in argument have been allowed to comment. Counsel may be mistaken, and the jury may disregard everything that he says, but, in a jury trial, the jury *must* take the law as the Court gives it to them, and if the Court gives them that which is not the law on a material point to a defendant's disadvantage, the defendant has not had that legal trial to which he was entitled.

It is not necessary to repeat the language of the Court of Appeals in the Eighth Circuit in the Balliet case showing why such an instruction is erroneous, misleading and prejudicial.

The instruction, given in the case at bar, as in the Balliet case, certainly went entirely too far. While it may be conceded that the instruction in the case at bar did not go as far as that delivered in the case of Maury I. Diggs v. United States, No. 2404, now pending in this appellate tribunal (see the difference between the instruction in the case at bar and in the case of Diggs v. United States set out on page 85 of our opening brief), still, in its emasculated and modified form, it is equally erroneous and constitutes reversible error. Such an instruction clearly comes within the denunciation of the Circuit Court of Appeals in the Balliet case. Such an instruction is unfavorable and prejudicial to a defendant. It places him in a most unfavorable and prejudicial attitude before the jury. It indicates a hostile attitude on the part of the trial Judge. It places an undue burden upon a defendant, requiring him to explain or deny *everything* of an incriminating nature. It is misleading. The jury is not informed what acts of an incriminating nature the defendant must explain or deny.

As was well said by the Supreme Court of the United States, in the case of Hicks v. United States, 150 U. S. 442; 37 L. Ed. 1137, 1138, *1141:*

> "Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, *to whose lightest word the jury, properly enough, give a great weight,* should intimate that the dread-

> ful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be *a competent* witness.' *The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.*"

The instructions of the trial Court, in the case just cited, were not nearly as prejudicial as the instructions in the Balliet case and in the case at bar, and yet the Supreme Court declared that:

> "The policy of this enactment *should not be defeated by hostile comments of the trial Judge, whose duty it is to give reasonable effect and force to the law.*"

We have made a most painstaking examination of every authority or statement of a text writer referred to by the able counsel for the government in their brief.

Briefly, we refer to the authorities and statements of the law cited by counsel for the government to show their utter inapplicability to the case at bar.

On pages 73-74 of the government brief, counsel refers to "the rule on the subject" contained in 12 Cyc., pp. 576-7. But "the rule on the subject" referred to relates to the proposition that:

> "The prosecuting attorney then has the same rights to attack his (defendant's) credibility in argument or to comment upon his testimony *or upon his failure or refusal to answer proper and material questions within his knowledge as in the case of any other witness.*"

That is not this case. The defendant Caminetti never refused to answer any proper or material questions on cross-examination. Had counsel for the government read a little further in Cyc., Vol. 12, on the next pages, 577-578, he would have found the rule applicable to the situation in the case at bar stated as follows:

> "In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*"

In the federal Courts and in the Courts of the State of California, the right of cross-examination is restricted to matters inquired of in chief.

12 Cyc., 577, 578;
People v. McGungill, 41 Cal. 429;
People v. Saunders, 114 Cal. 216;
State v. Elmer, 115 Mo. 401; 22 S. W. 369;
State v. Fairlamb, 121 Mo. 137;
State v. Baldsoer, 88 Iowa 55;
Balliet v. United States, 129 Fed. 689;
United States v. Mullaney, 32 Fed. 370;
Sec. 13, Art. 1, Const. of Cal.;
Sec. 1332, Cal. Penal Code.

In the case of United States v. Mullaney, just cited, Mr. Justice Brewer said:

> "Of course, cross-examination is, in the federal Courts, limited to the matter of the direct examination, and cannot extend beyond the

> facts and circumstances which are a part of or connected directly with the subject matter of the direct testimony."

The case of State v. Ober, 52 N. H. 549; 13 American Reports 88, "a case frequently cited on this subject", as counsel for the government inform us on page 74 of his brief, is absolutely inapplicable and relates to a refusal of a defendant, in that case, "to submit to a full cross-examination, within proper limits". That is not this case. The defendant Caminetti never refused to submit to a full cross-examination within proper limits, and was not asked a single question on cross-examination.

The case of People v. Mead, 145 Cal. 500, cited on page 79 of the government brief, is not applicable at all, because in that case it appeared "that the defendant had testified *equivocally* on that subject and denied the marriage, if at all, only by implication". It was held that the prosecuting attorney had the right to comment upon the *equivocal* manner in which he testified and denied the marriage. That is not this case.

The same may be said of another California case cited by counsel for the government on page 79 of his brief, the case of People v. Wong Bin, 139 Cal. 65, 66. In that case, the defendant took the stand and "went *fully* into the details of the difficulty, claiming that the killing was in self-defense". Having gone *fully* into the subject, it was held that "under these circumstances the district attorney

was authorized in commenting upon his failure to deny certain alleged statements testified to by other witnesses to have been made by him, *inconsistent with his testimony given on the trial".* The Supreme Court immediately qualified this language by adding:

> "The question thus presented is *very different* from the case where the defendant is not a witness at all, *or a witness only as to some formal matter."*

On page 81 of the government brief, counsel make the bold declaration that:

> "The rule is recognized and enforced by the Supreme Court of the United States in Fitzpatrick v. United States, 178 U. S. 304-316; 44 Law Ed. 1083."

In our opening brief, pages 115-117, we referred, at considerable length, to the leading case of Fitzpatrick v. United States, supra, and showed unquestionably that that case only involved the point as to the proper limits of the cross-examination to which a defendant subjects himself when he takes the stand. That is not the case at bar, because the defendant Caminetti was not cross-examined at all.

The case of Powers v. United States, 223 U. S. 303-316; 56 L. Ed. 448, cited on pages 83, 84 of the government brief, is also utterly inapplicable to the situation in the case at bar. That case, like the Fitzpatrick case, involved the question as to the proper limits of the cross-examination of the defendant. That is not the case at bar. No question

as to the proper limits of any cross-examination of the defendant Caminetti arises, for he was not cross-examined at all.

The case of Sawyer v. United States, 202 U. S. 150-168; 50 L. Ed. 979, cited on pages 84-85 of the government brief, is also utterly inapplicable to the situation in the case at bar. The question involved in that case was as to the proper limits of the cross-examination of the defendant. The Supreme Court, through Mr. Justice Peckham, held:

> "It has been held in this Court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the *right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime.*" (Citing Fitzpatrick v. United States, 178 U. S. 304; 44 L. Ed. 1078, 20 Sup. Ct. Rep. 944.)

No such proposition or question is involved in the case at bar, for the defendant Caminetti was not cross-examined at all.

The case of Cotton v. State, decided by the Supreme Court of Alabama, 6 South. 372, cited on page 85 of the government brief, is also, upon the facts, utterly inapplicable to the case at bar. There, it appeared that:

> "Defendant was sworn and examined on his own request, and *refused to deny* that he took the steer, or that he sold it to one Beasley."

In his argument to the jury, the prosecuting attorney was held justified in commenting on the re-

fusal of the defendant to deny as above stated. Such a state of facts does not exist in the case at bar.

We are unable to find a case of Graves v. State, claimed, by counsel for the government, on page 85 of their brief, to be reported in 7 South. 317, but if it is anything like the case of Cotton v. State, supra, it is self-evident that it is inapplicable to the case at bar.

The case of State v. Harrington, 12 Nev. 129, relied upon by counsel for the government on pages 80-81 of their brief, is also inapplicable as to the facts, and furthermore what is there said is clearly obiter dictum.

In that case it appeared that:

> "Counsel for defendant, in his argument before the jury, which preceded that of the district attorney, claimed and argued that the statements of witness Merrow were false. The district attorney in his reply, *without objection on the part of counsel for defendant or the court,* stated to the jury 'that, inasmuch as the defendant, when testifying in his own behalf, had not contradicted the statement of Merrow, they must take said statement as absolutely true, that therefore it was true'."

The case was reversed. The Supreme Court, in its opinion, approved of one of the very authorities cited by us in support of the point we make that error was committed by the trial Court. That authority is People v. McGungill, cited by us on pages 110, *133-134* of our opening brief. The Supreme

Court of Nevada, in approving of the law as declared in the case of People v. McGungill, said:

> "In the second case (People v. McGungill) the defendant offered himself as a witness in his own behalf, and was only asked if he had had certain conversation with one Yates, testified to by said Yates, and he answered that he had not. *He was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court.* Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. *The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense; first, in allowing counsel to press in cross-examination further than is permissible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt.*
>
> *It need not be stated that the facts of the two cases cited and the one in hand are so widely different that the former are no authority for appellant in this case.*

> In addition to the foregoing, it is proper to remark that it is apparent to our minds, from the bill of exceptions, that the comments of the district attorney complained of were called by those of the defendant's counsel in declaring the testimony of the witness Merrow to be false. In reply, the district attorney, to sustain the witness, and to show the truthfulness of his testimony, stated that the defendant, although he had an opportunity to do so, had not contradicted the witness. The comments, under the circumstances, were proper."

The defendant in the case at bar was not cross-examined at all, and was only asked on direct examination concerning certain conversations. In fact, the language of the Supreme Court of Nevada in the case of State v. Harrington can readily be paraphrased so as to apply to the facts of the case at bar as follows:

> *"He (defendant) was examined no further by his counsel than concerning such conversation, nor was he examined upon any other point, but answered all questions required of him by the court. Upon the argument, counsel for the prosecution commented upon the fact, before the jury, that the defendant refused to be cross-examined as to the whole case. Defendant's counsel protested against such comments, but they were continued by permission of the court. The appellate court held that such action by the court below was error. No witness under the circumstances stated could have been cross-examined as to the whole case. If the court had compelled defendant to answer beyond the line of legitimate cross-examination, its action would have been error in a double sense; first, in allowing counsel to press in cross-examination further than is permis-*

sible in other cases; second, in compelling defendant to furnish, against his will and contrary to law, testimony for the prosecution. Defendant only claimed the rights of an ordinary witness under the established rules of evidence. Counsel for the prosecution, by permission of the court, and against the rightful protest of defendant, contrary to the fact, construed a legitimate exercise of a legal right to be evidence of defendant's guilt."

Counsel for the government claims that recent decisions by the Supreme Court of Missouri have reversed or repudiated the earlier Missouri decisions. An examination of these decisions will show that, as to the facts involved, they are utterly inapplicable to the legal situation in the case at bar, and now presented to this appellate tribunal because of the instructions of the trial Court. They involved comments of prosecuting officers, and not instructions such as are presented in the case at bar.

In the case of State v. Raftery, 158 S. W. 585, 587, referred to on page 103 of the government brief, it affirmatively appears that the trial Court instructed the prosecuting attorney *"not to comment on any portion of the case that he (defendant) did not testify about. I will ask the jury to disregard that statement."* It was held, on appeal, that the rights of the defendant in that case had been fully protected by the instructions of the trial Judge to disregard the uncalled-for comments of the prosecuting officer.

In the case at bar, the trial Judge not only refused to check or reprove counsel for the govern-

ment in their comments upon the failure of the defendant to explain that or this or some other matter, which they deemed of an incriminating nature, but the trial Court, on more than one occasion, stated in the presence of the jury that he would instruct the jury in accordance with the arguments of counsel for the government.

The next case referred to by counsel for the government in their brief, on pages 103-109, is that of State v. Larkin, 157 S. W. 600-4. That case involved comments made by the prosecuting attorney in his argument to the jury. It certainly did not involve an instruction, such as is presented in the case at bar. It was held that the trial Court had fully protected the rights of the defendant in that case in stating:

> "The court has said to stay within the record and *that should not be commented on.*"

The Supreme Court of Missouri, after an elaborate examination of the statutes of that state applicable to the rights of a defendant as a witness in his own behalf and a review of a number of authorities relating to the rights of prosecuting attorneys to comment upon the testimony given by defendant, concluded:

> "That the point made by the defendant touching the comment of the prosecuting attorney, so far as the objection thereto was applicable to the facts, was *allowable*" (see page 607).

The Court also stated, on page 604:

> "Leaving for a moment the broad and ever-recurring question of the right of prosecuting

> attorneys to comment upon the failure of a defendant who takes the stand, to testify to facts within his knowledge, or to facts and statements attributed to him, we might say in passing that upon the record and outside of this question *there is no warrant in the testimony for the statement of the prosecuting attorney. * * * In our view the chief vice in the utterance of the prosecuting attorney in this behalf arose from the fact that he was not correctly quoting what the record showed.*"

The case was reversed on this and other grounds and sent back for a new trial. In view of what the Supreme Court of Missouri stated, as to the comments of the prosecuting attorney, we submit that much of its opinion is obiter dictum. Certainly the situation in that case is radically different from the one presented by the record in the case at bar. That case involved simply comments of the prosecuting officer, which the record showed were not justified, and the trial Court fully protected the rights of the defendant by instructing the prosecuting attorney:

> "to stay within the record and *that should not be commented on*" (see page 603).

But, in the course of its opinion, the Supreme Court of Missouri concedes that the rule in the State of California is entirely different. As we have seen, the rule in the State of California is the same as that which exists in the federal Courts. In other words, "cross-examination is, in the federal Courts, limited to the matter of the direct examination, and cannot extend beyond the facts and

circumstances which are a part of or connected directly with the subject matter of the direct testimony" (language of Mr. Justice Brewer in United States v. Mullaney, 32 Fed. 370; see authorities set forth on pages 110-111 of our opening brief and repeated on page 15 of this reply brief).

The rule is well settled, and is thus summarized in Cyc., Vol. 12, pp. 577-578:

> "In those states where the accused is subject to cross-examination only as to those matters testified to on his direct examination, the prosecution *cannot comment upon his silence on cross-examination as to matters not touched upon in direct examination.*"

See, also,

Cooley Const. Lim., (6th ed.) 384-386;
State v. Lurch, 12 Oregon 99;
State v. Graves, 95 Mo. 510;
People v. O'Brien, 66 Cal. 602;
Gale v. People, 26 Mich. 157;
Fitzpatrick v. U. S., 178 U. S. 304;
Balliet v. United States, 129 Fed. Rep. 689.

As to his examination and cross-examination, the defendant stood as any other witness in the case, but he was still within the protection of the constitution, and not required to furnish evidence against himself.

It is clear that the prosecuting attorneys had no right to interrogate defendant concerning anything not relevant to his examination in chief, and for the stronger reason, the trial Judge had no right to

comment or instruct where the prosecutor could not inquire, and the jury should not have been directed to draw adverse inferences from a reserve which the law holds sacred against intrusion.

The fact, therefore, that defendant Caminetti went upon the stand and testified did not justify the instructions complained of; especially in view of the fact that he was not cross-examined at all.

All of the authorities referred to in the case of State v. Larkin, supra, and also referred to by counsel for the government in their brief on pages 260-261, involved, with perhaps one or two exceptions, the propriety of comments made by prosecuting attorneys in their arguments to the jury and the ever-recurring question whether the comments, under the particular and peculiar circumstances of each case, were justifiable. *In not one of those cases was the question presented of instructions to a jury such as are involved in the case at bar. Not one of those decisions or authorities upholds instructions similar to the ones presented for consideration to this appellate tribunal in the case at bar. Counsel for the government are unable to cite to this Honorable Court one single authority upholding the instructions given by Judge Van Fleet in the case at bar. The Circuit Court of Appeals, in the Balliet case, severely criticized and held to be reversible error an instruction very similar to the one presented for consideration in the case at bar. The reasoning, the logic, of the opinion rendered in the Balliet case applies, with peculiar force to in-*

structions such as were given in the case at bar. The rationale of the opinion in the Balliet case shows clearly and convincingly that such instructions as were given in the case at bar are erroneous, misleading, and indicate a hostile attitude on the part of the trial Judge.

It is with no small degree of amusement that we read the closing words of counsel for the government in their brief on this branch of the case, wherein they state:

> "The Balliet case, in our judgment, does not sustain the contention of counsel. *But if it should be so considered it cannot stand as against the* LONG *line of federal and state decisions cited by us in the preceding pages. The instruction given by the distinguished trial judge was in line with the* VAST *line of adjudications made by the Supreme Court of the United States and by the various states in the American Union"* (see page 90 of brief of government).

The "long line of federal and state decisions cited by us (the special assistants to the attorney general) in the preceding pages" of their brief will be found to consist of twelve decisions, to all of which we have referred in the preceding pages of this reply brief, none of which involve an instruction, such as was given in the case at bar, and most of which relate to improper comments made by prosecuting attorneys, and, as we have shown, do not apply to the facts or situation involved in the case at bar at all. Not a *single federal decision* is cited by counsel for the government upholding such an

instruction as is involved in the case at bar. As we have seen, the federal cases cited by the special assistants to the attorney general in their brief, such as Fitzpatrick v. United States, 178 U. S. 304-316; Powers v. United States, 223 U. S. 303-316; Sawyer v. United States, 202 U. S. 150-168, do not apply at all and simply relate to the proper limits of cross-examination of a defendant.

Counsel for the government certainly drew most liberally upon their fertile imaginations when they stated, on page 90 of their brief, that:

> *"The instruction given by the distinguished trial judge was in line with the* VAST *line of adjudications made by the Supreme Court of the United States."*

As we have seen, not a single decision of the Supreme Court of the United States can be brought forward by counsel for the government, in spite of all their labor and research, approving of the instruction complained of in the case at bar. On the contrary, the only case in the federal Courts where a similar instruction was under consideration, is that of Balliet v. United States, in which the Circuit Court of Appeals for the Eighth Circuit unanimously declared that instructions of a similar character to those involved in the case at bar were erroneous and were misleading. The instruction in the case at bar, if not word for word the same as in the Balliet case, is practically the same in effect and

import, and comes within the reasons announced by the Circuit Court of Appeals in the Balliet case.

It does seem to us that had the trial judge in the case at bar charged the jury, as did Judge Pollock in the case of United States v. Baker (see charge fully set out on pages 76-83 of our opening brief) the ends of justice would have been fully subserved and the defendant Caminetti would have had that fair and impartial trial guaranteed to him by the Constitution and laws of the United States.

The situation of the defendant in the case of United States v. Baker, judging from the statements contained in Judge Pollock's charge, was somewhat similar to the position of the defendant Caminetti, in that it was claimed that there was no previous specific intent in the transportation of the young women (assuming that Caminetti did anything to transport Lola Norris, which we deny).

Judge Pollock stated to the jury, in that case:

> "The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to the City of St. Joe for the purpose of getting business in his occupation; that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl, that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He traveled with her to St. Joseph *and that they there lived together. If what the*

defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this state he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.

Now it is the contention of the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, this intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law.

If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she should engage in prostitution, debauchery or immoral practices, then he is not guilty. The burden of proving this charge beyond a reasonable doubt is on the government.''

In the case at bar, it affirmatively appears, from the lips of Lola Norris and Marsha Warrington, the prosecuting witnesses themselves, that the defendant could not have had the intent ascribed to him in the indictment. The testimony of Lola

Norris herself is conclusive on this point. She testifies:

> "Q. Was it not your idea and the idea of everybody to get out of Sacramento, to get out of town, and to escape the notoriety and disgrace?
>
> The COURT. Q. Was is to get out of Sacramento or to get out of the state?
>
> A. We didn't want to get out of the state, we thought if we could possibly stay there and avoid it we were willing to do that and face any disgrace that might come up; I don't remember that anything was said about getting out of the state. *The idea was to avoid any notoriety or scandal that might arise.*
>
> Q. Without any particular place being mentioned?
>
> A. No, sir." (Transcript of Record, p. 318.)

Further on, in her direct examination, Lola Norris stated as follows:

> "Mr. ROCHE. Q. Did he say anything as to what was to become of you in the event that you went away with him?
>
> Mr. DEVLIN. Your honor, I object to that as being leading and suggestive and not asking her to give the conversation. It is suggesting to her the subject matter.
>
> The COURT. No, he is simply calling for any statement that was made, he is not asking her to state as to any particular thing.
>
> Mr. DEVLIN. We note an exception.
>
> A. I don't remember just exactly what he did say about that.
>
> Q. Was there anything said during those conversations as to any contemplated marriage between yourself and himself?

Mr. Devlin. I object to that. The witness has answered the question. It is a very leading question.

Mr. Roche. We have a right to call her attention to a particular subject matter now.

The Court. The objection is overruled.

Mr. Devlin. We note an exception.

A. On the Saturday before we left—that was the day before, Mr. Caminetti said that his wife would start action for divorce he knew as soon as she found out that he was gone and then we would be married; but before that I don't remember Mr. Caminetti saying anything about what his wife would do." (Transcript of Record, p. 296.)

Again Lola Norris stated on her direct examination:

"No, there was nothing said as to how we were going to live." (Transcript of Record, p. 302.)

Lola Norris, on cross-examination, testified as follows:

"Mr. Caminetti did not, in any of those conversations, propose to me that I should go from Sacramento to Reno for the purpose of having sexual intercourse with him. He never did propose to me that I should go from Sacramento to Reno for the purpose of being his mistress. In any conversation where Mr. Diggs was present, I never heard him say he desired Miss Warrington to go from Sacramento to Reno for the purpose of having sexual intercourse with her. I never heard him say he desired her to go for the purpose of being his mistress. The subject of sexual intercourse or the subject of being a mistress was never discussed in any of those conversations. Never by

anybody." (Transcript of Record, pp. 309-310.)

Marsha Warrington also testified:

> "Mr. Diggs did not say to me *at any time,* that he wanted me to go over there for the purpose of living with him." (Transcript of Record, p. 270.)

It is clear, from this testimony of the prosecuting witnesses themselves, that the intent and purpose in leaving Sacramento for Reno was one entirely inconsistent with the intent and purpose denounced by the "White slave traffic Act" and alleged in the indictment.

In the Pollock case, as in the case at bar, when the respective defendants reached their destination they lived together. But this fact alone was not conclusive of the defendants' guilt in either case. The defendant in the case at bar was acquitted of having persuaded, enticed or induced Lola Norris or Marsha Warrington to go with him. The evidence clearly shows that the young women acted voluntarily and of their own free will and accord and desired to leave Sacramento in order to avoid the scandal and notoriety they believed to be impending and about to break forth. Here, again, the language used by Judge Pollock, in his charge to the jury in the Baker case, is instructive and, we submit, lays down the correct rules of law applicable to prosecutions under the "White slave traffic Act" where the facts presented in evidence

are such as were developed in the Baker case and the case at bar. Says the learned judge:

> *"The evidence is that she was really the one who wanted to go with the defendant;* so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. *She says she wanted to go and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce.* If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and you will so find; *believing the contrary, the government has failed to convince you that is true as charged in this indictment, then you will find him not guilty.* Again, *suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his intentions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the state authorities of Missouri, and not for the federal government, because, as I have said, what constitutes adultery, what*

> *constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the state. So what did this man intend? That is the question for your determination."*

We respectfully submit that the views announced by Judge Pollock in the Baker case are directly applicable to the situation existing in the case at bar.

In closing our argument on this most important branch of the case, we put this question to this Honorable Court, paraphrasing the apposite language used by the Circuit Court of Appeals in the Balliet case (129 Fed. Rep. 689-*696*):

> "Are you able to say with certainty, as you must be to uphold the verdict, that the defendant was not prejudiced by the instruction?"

III.

Answering subdivision VII of the government brief, that the prosecuting attorneys were not guilty of misconduct, prejudicial to the defendant, during their arguments to the jury, it will be noted that on pages 159-169 of their brief, counsel for the government endeavor to take refuge behind the highly technical defense that counsel for the defendant, while confessedly protesting against the improper remarks and their continued use, did not also, in every instance, ask the trial Court to instruct the jury to disregard the improper remarks.

It is quite evident that counsel for the government keenly appreciate the force of the objections and assignments of errors urged before this appellate tribunal, that they were guilty of misconduct in using the language employed by them in addressing the jury; otherwise they never would now advance the technical defense, to protect them from their confessed acts of misconduct, in urging, upon this appellate tribunal, that counsel for the defendant should have, in each instance, besides vehemently, earnestly and persistently protesting against the improper remarks, also asked the Court time and again to instruct the jury to disregard the improper remarks.

Counsel refers to certain authorities in the state Courts. Whatever the rule may be in the state Courts, such is not the rule in the federal Courts. The rights of a defendant on trial for his liberty,

in the federal Courts, are not measured by such technical considerations. As was well said by the Circuit Court of Appeals for the Eighth Circuit in the case of Pettine v. Terr. of New Mex., 201 Fed. 489, *494, 497:*

> "In criminal cases, where the life, or as in this case the liberty, of the defendant for the probable remainder of his natural life is at stake, the Courts of the United States in the exercise of a sound discretion may notice grave errors in the trial of a defendant although the questions they present *were not properly raised in the trial Court by request, objection, or exception."*

Citing:

Wiborg v. United States, 163 U. S. 632, 658; 16 Sup. Ct. 1127, 1197; 41 L. Ed. 289;

Clyatt v. United States, 197 U. S. 207, 221; 25 Sup. Ct. 429; 49 L. Ed. 726;

Crawford v. United States, 212 U. S. 183, 194; 29 Sup. Ct. 260; 53 L. Ed. 465; 15 Ann. Cas. 392;

Weems v. United States, 217 U. S. 349, 362; 30 Sup. Ct. 544; 54 L. Ed. 793; 19 Ann. Cas. 705;

Williams v. United States, 158 Fed. 30, 36; 88 C. C. A. 296, 302;

Humes v. United States, 182 Fed. 485, 486; 105 C. C. A. 158, 159.

See, also,

People v. Becker, 104 N. E. Rep. 396.

But, we insist that, in the federal Courts, it is sufficient to take an exception to the remarks of the prosecuting attorney; it is sufficient to protest against his misconduct and to call the attention of the Court to the same, and if substantial injury is done to a defendant, by the taking of an exception—by the protest made at the time of misconduct—a federal appellate tribunal will notice and consider acts of misconduct on the part of prosecuting attorneys resulting in substantial injury to a defendant.

The Supreme Court of the United States, in the case of Hall v. United States, 150 U. S. 76, *82,* said:

> "The presiding judge, by declining to interpose, notwithstanding the defendant's *protest* against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of *exception, and, having been duly excepted to, entitled him to a new trial.*" (Citing Wilson v. United States, 149 U. S. 60, *67, 68.*)

Furthermore, it is quite evident, from a reading of the record, as to what took place at the time of the acts of misconduct and the protests and taking of exceptions by counsel for defendant, that a request of the trial Judge that he instruct the jury to disregard the improper remarks would have been vain and superfluous. The trial Judge, in refusing to check or reprove the prosecuting attorneys, although counsel for defendant vehemently and con-

tinuously protested, objected and excepted, indicated that any request, if such be deemed necessary in federal Courts, to instruct the jury to disregard the improper remarks, would have been refused. It is but necessary to read his remarks in the record in this connection.

But, as we have already stated, it is a fundamental rule of justice in the federal appellate Courts that plain and substantial errors depriving a defendant of a fair and impartial trial will be noticed and considered, even though *no objection or exception be taken at all.*

The rule is well and compendiously stated as follows:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the Court, though not objected to below."
>
> Cyc., vol. 2, p. 678, and cases there cited;
>
> See, also, 2 Cent. Dig., title "Appeal and Error", secs. 1145 *et seq.;*
>
> Fuller v. Ferguson, 26 Cal. 546;
>
> Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859;
>
> Garland v. Davis, 4 How. 131, 11 L. Ed. 907;
>
> Kentucky L. Ins. Co. v. Hamilton, 63 Fed. R. 93, 22 U. S. App. 586, 548, 11 C. C. A. 42.
>
> "But where error appears in the record proper, the appellate or reviewing Court may

correct it notwithstanding that no exception was taken thereto."

Cyc., vol. 2, p. 715, and cases there cited:

2 Cent. Dig., title "Appeal and Error," sec. 1147;

Macker v. Thomas, 7 Wh. 530, L. Ed. 515.

The alleged misconduct appears in the record proper—in the bill of exceptions.

When, from the whole case, manifest injustice has been done, the appellate Court will remedy the error, notwithstanding that no objection was made.

Ringgold v. Haven, 1 Cal. 108.

When the whole record is brought up, the Court may reverse upon a defect not noticed below, *and even upon its own notice of one not pointed out by counsel.*

Garland v. Davis, 4 How. 131, *143,* 11 L. Ed. 907.

If error is apparent upon any part of the record, it is open to review, whether it is found in the *bill of exceptions or elsewhere.*

Suydam v. Williamson, 20 How. 427, 15 L. Ed. 978.

The appellate Court will notice a plain error in the record, even though there be *no assignment of error.*

United States v. Pena et al., 175 U. S. 500, 44 L. Ed. 251;

Stevenson v. Barbour, 140 U. S. 48, 35 L. Ed. 338;

Rowe v. Phelps, 152 U. S. 87, 38 L. Ed. 365.

No presumption can be made in favor of the judgment of a lower Court where error is apparent in the record.

United States v. Wilkinson, 12 How. 246, 13 L. Ed. 974;

Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244.

The error appearing, as it does, on the face of the record, and being a most substantial one, involving the sacred and constitutional right of the defendant to a fair and impartial trial, will be considered by the Circuit Court of Appeals, even though *no objection* was made at the time or until after it was ascertained that the mischief had been done.

If a federal appellate tribunal, in the interests of justice, will go so far as to notice and consider acts of misconduct of prosecuting attorneys which amount to substantial errors depriving a defendant of a fair and impartial trial, although no objection or exception is taken, it certainly will consider the acts of misconduct complained of in the case at bar, where it affirmatively appears, from the record, that counsel for the defendant repeatedly and insistently, vehemently and vigorously, protested, objected and excepted to such acts of misconduct and called the attention of the trial Judge to the same and that the trial Judge refused to reprove or check the prosecuting attorneys in their acts of misconduct in making improper remarks in their arguments to the jury, and, in fact, on occasions,

approved of the improper remarks, telling the prosecuting attorneys to "proceed", or otherwise showing his approval, and, on at least two occasions, stating that he would instruct the jury in consonance with the arguments advanced by the prosecuting attorneys.

IV.

Answering Subdivision VIII of the government brief, pages 196-197, in which counsel for the government contend that:

> "The trial Court committed no error in refusing the several instructions requested by the defendant, numbered 99, 100, 107, 109, 111 and 114, advising the jury that the mere presence of Caminetti without any act of participation on his part, constituted no offense",

we append a few authorities not in our possession at the time of the writing of our opening brief.

The erroneous rulings of the trial Court, in this connection, are discussed by us on pages 249-260 of our opening brief. We there contended that some of the instructions requested on behalf of the defendant, advising the jury that mere presence by the defendant Caminetti, without any act of participation on his part, did not constitute the commission of any offense so far as he was concerned, should have been given by the trial Judge. In other words, that the defendant Caminetti was entitled to have his defense presented to the jury and submitted to them for their consideration.

We contended in the trial Court, and now maintain, that the "mere presence" of the defendant Caminetti, when the tickets were purchased by Diggs for Lola Norris, did not make him a principal or accessory, and we contended that the defendant Caminetti was entitled to have this view of his defense submitted to the jury.

As was well said by the Supreme Court of the State of California in the case of People v. Keefer, 65 Cal. 232:

> "However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true."

So, in the case at bar, the defendant was entitled to some of the instructions requested by him upon the theory that his testimony was entirely true and that he did not "participate in or instigate the crime".

In the case of State v. Larkin, 157 S. W. 600, the case cited by counsel for the government in support of their claim that the earlier Missouri doctrine, inhibiting comments by prosecuting attorneys upon the failure of a defendant to testify, etc., had been repudiated, it was held that "mere presence at the scene of killing without more is not such aiding, abetting, assisting, encouraging, or advising such killing as is required by law to constitute guilt" (quoting from syllabus).

In the case of People v. Woodward, 45 Cal. 293, the counsel for the defense asked the Court to charge the jury as follows:

> "If you are satisfied from the evidence that the defendant stood by at the time the offense is alleged to have been committed, but did no act to aid, assist, or abet the same, you should find the defendant not guilty."
>
> "The Court refused to give the charge, and this ruling is assigned as error. We think the

charge was improperly refused. If the defendant 'did no act to aid, assist, or abet' the perpetration of the crime, he is guilty of no violation of law from the mere fact that he was present. His presence, if unexplained, would be a circumstance tending to show his complicity in the transaction. But it was for the jury to decide from all the facts proved, whether he aided, assisted, or abetted the perpetration of the offense; and if they were satisfied that though present, he did not in fact aid, assist, or abet the perpetration, it would have been their duty to acquit him. *The defendant was entitled to have the jury instructed to that effect.*"

So, in the case at bar, the defendant Caminetti was entitled to have the jury instructed that although he was present when the tickets were bought, if he did not in fact aid, assist, or abet the purchaser Diggs, it was their duty to acquit him. He was at least entitled to have the jury advised as to what act or acts or conduct constituted him a principal and that mere presence at the time and place of the commission of the offense was of itself insufficient in law. It was for the jury to determine the facts and to pass upon his credibility as well as the credibility of Lola Norris and Marsha Warrington. *The defendant was entitled to have his theory of his defense submitted to the jury, under appropriate instructions from the Court.*

We cite a number of authorities strongly supporting the views we have advanced in this connection:

1 A. & E. Ency. Law, 63;

State of Mo. v. Cox, 65 Mo. 29;

Moore v. State, 111 Pac. 822;
Ring v. State, 42 Tex. 282;
Golden v. State, 18 Tex. App. 637;
People v. Foley et al., 59 Mich. 553;
People v. Woodward, 45 Cal. 293;
People v. Ah Ping, 27 Cal. 489;
People v. Maxwell, 24 Cal. 14;
Lamb v. Harbaugh, 105 Cal. 680, *696*;
State v. Hildreth, 51 Am. Dec. 369;
U. S. v. Nunnemacher, 7 Bissell, 111, *118*;
U. S. v. Goldberg, 7 Bissell, 175;
Woolweaver v. State, 40 A. S. R. 667;
Hicks v. U. S., 150 U. S. 442;
Hilmes v. Stroebel, 59 Wisc. 74;
Commonwealth v. Wilson, 186 Pa. 1;
Plummer v. Commonwealth, 1 Bush, 76;
Connaughty v. State, 60 Am. Dec. 370;
U. S. v. Jones, 3 Wash. C. C. 209;
Martin v. State, 25 Geo. 494;
Rex. v. King, Russ. & Ry. 332, 333;
Desty, Am. Cr. Law, Sec. 11 g.

V.

On the point that the Court erred in not instructing the jury that the girls were accomplices, Mr. Roche quotes the evidence given for the government to show that they were not accomplices, but he ignores the evidence introduced by the defendant showing that they counseled and aided the defendant. The act in which they took part was a crime—punishable by the state law, and the girls were at liberty, on bail, at the time on an accusation charging them with an offense. The law as to accomplices is based upon the theory that when two persons are implicated in an act, or a series of acts, for which both may be punished in some tribunal, and one attempts to throw all the blame upon the other, the jury should be told to view with suspicion the testimony of the person seeking to shield himself and incriminate the other. It is immaterial whether the girls could be punished under the Mann law, or under the state law. They could be punished and had been arrested for the same acts for which the defendant was being tried, and at the time of the trial in the Court below the cases against them were pending in the state Court. They had been arrested and were then being held as principals equally with the defendants Diggs and Caminetti.

VI.

As we deem that we have fully presented our views, in our opening brief, upon all the other points discussed by counsel for the government in the reply brief, we shall not further elaborate upon them in this reply brief.

Dated, San Francisco,
January 4, 1915.

Respectfully submitted,

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